S.B.Civil Second Appeal No.210/2007.

Smt. Kanku Bai through her LR.

vs.

Nathdwara Temple Board and another.

Date : 21.5.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr.SN Trivedi, for the appellant.
Mr.DR Bhandari, for the respondent no.1.

- - - - -

Heard learned counsel for the parties.

Two courts below have decreed the suit for possession against the defendant/appellant : by trial court vide judgment and decree dated 20.9.2004 and by the first appellate court vide judgment and decree dated 25.4.2007.

Learned counsel for the appellant submitted that the plaintiff/respondent no.1 filed suit against Smt. Kanku Bai and one Bal Mukand. Smt. Kanku Bai died on 9.8.1991 but no application for bringing her legal representatives on record was filed, therefore, the suit abated. The plaintiff did not choose to file application for setting aside abatement but filed only

application for bringing on record the legal representatives. The trial court, without setting aside the abatement of the suit, allowed the application and took on record the legal representative of Smt. Kanku Bai. According to learned counsel for the appellant, when there was no application for setting aside the abatement, the suit already stood abated on 9.8.1991, therefore, all the proceedings in the suit thereafter were void.

Learned counsel for the appellant also stated that the plaintiff produced photostat copy of the notice which is alleged to have been sent to the defendant. That photostat copy of the notice was not admissible in evidence. It is submitted that the plaintiff did not sought any permission to lead secondary evidence nor he has proved that said photostat copy was the photostat copy of the original notice. It is also submitted that both the courts below committed serious error of law in holding that the notice bears the signature. The appellant denied the signatures and there is no evidence of expert on record, therefore, the courts below committed error of law in holding that said signatures were of the appellant.

I considered the submissions of learned counsel for the parties and perused the impugned judgments as well as facts of the case.

It is not in dispute that defendant no.1 Kanku Bai died on 9.8.1991 and the application was submitted by the plaintiff on 28.9.1992 under Order 22 Rule 4 CPC. Counsel for Smt.Kanku Bai continuously appeared before the trial court and did not submit any application under Order 22 Rule 10A CPC intimating about the death of Smt. Kanku Bai. Legal representative of defendant no.1 Smt.Kanku Bai was taken on record and he continued to take part in the suit proceedings since 1992. The argument of abatement of suit was raised for the first time at the final arguments' stage which appears to be in the year 2004. Therefore, at such a belated stage, such type of objection could not have been allowed by the trial court. Be it as it may be, when the trial court took on record the legal representative of defendant no.1 by specific order, then that amounts to setting aside of abatement of suit without which the legal representative could not have been taken on record. In this view of the matter, there is no force in the contention of learned counsel for the appellant that the suit abated on 9.8.1991 and the abatement has not been set aside by the trial court. The defendant's legal representative got full opportunity to contest the suit and thereafter, after failing, he raised this objection at such a belated stage which was only to frustrate the fruits of the litigation.

So far as exhibiting photostat copy of notice is concerned, that was exhibited and that at time and no objection was raised by the defendant. Further, the objection sought to be raised is of formal nature and not of the nature which makes the document absolutely unenforceable. The objection is not of such nature on the basis of which the document could not have been acted upon. Otherwise also, the notice is only a one piece of evidence amongst others.

Learned counsel for the appellant also submitted that the plaintiff failed to prove the title deed.

It appears from the issue no.1 itself that the case of the plaintiff was that the suit property was given for management to the defendant no.1 and the issue of title was not raised.

In view of the above, I do not find any substantial question of law involved in this appeal.

Consequently, this second appeal, having no merit, is hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya